No. 08-351

In The Supreme Court of the United States

ANITA ALVAREZ, COOK COUNTY STATE'S ATTORNEY,

Petitioner,

v.

CHERMANE SMITH, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE CATO INSTITUTE, GOLDWATER INSTITUTE SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION, AND REASON FOUNDATION AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether courts should apply the "speedy trial" test employed in *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), in determining whether the Due Process Clause requires a state or local government to provide owners of property seized for civil forfeiture with a post-seizure probable cause hearing before the actual forfeiture proceeding.

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INTEREST OF THE AMICI CURIAE

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of particular interest to Cato because Cato scholars have written, spoken and testified often on behalf of civil assert forfeiture reform, and Cato published the book *Forfeiting Our Property Rights: Is Your Property Safe from Seizure?* (1995), authored by Rep. Henry J. Hyde, the principal sponsor of the federal Civil Asset Forfeiture Reform Act (2000).[1]

The Scharf-Norton Center for Constitutional Litigation is part of the Goldwater Institute, which is a tax exempt educational foundation under section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute Scharf-Norton Center for Constitutional Litigation advances public policies that further

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[1] Pursuant to Supreme Court Rule 37.3(a), counsel of record states that the parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the bill of rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute Scharf-Norton Center for Constitutional Litigation neither seeks nor accepts government funds, and no single contributor has provided more than five percent of its annual revenue on an ongoing basis. The Goldwater Institute Scharf-Norton Center for Constitutional Litigation regards property rights as the foundation of individual liberty. Civil forfeiture laws often violate property rights by denying citizens the most basic protections of due process. This case is an important opportunity for the Court to bolster the rule of law and property rights by underscoring the Constitution's guarantee of a timely opportunity to be heard after the deprivation of one's rights.

Reason Foundation is a national, nonpartisan and nonprofit public policy think tank founded in 1978. Reason's mission is to promote liberty by developing, applying and communicating libertarian principles and policies, including free markets, individual liberty and the rule of law. Reason promotes policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason Magazine*, as well as commentary on its websites, www.reason.com and

www.reason.tv, and by issuing policy research reports that promote choice, competition and a dynamic market economy as the foundation for human dignity and progress. Reason selectively participates as amicus curiae in cases raising significant constitutional issues, to further Reason's avowed purpose to advance "Free Minds and Free Markets." This case is important because it addresses the need for robust due process protections to avoid capricious deprivations of property rights that undermine the rule of law.

STATEMENT OF THE CASE

1. This case involves a factual challenge to provisions of Illinois' Drug Asset Forfeiture Procedure Act (Illinois DAFPA), 725 Ill. Comp. Stat. Ann. 150/1 *et seq*. (West 2008). Under Illinois law, illegal drugs, property used to carry out or facilitate drug crimes, and the proceeds of drug crimes are all subject to civil forfeiture. *E.g.*, 720 Ill. Comp. Stat. Ann. 570/505(a) (West Supp. 2009). The Illinois DAFPA sets out procedures for effecting that forfeiture.

Certain categories of personal property – conveyances of any value and other personality worth $20,000 or less – may be forfeited through a non-judicial, administrative procedure if no one with a property interest demands a judicial proceeding. See 725 Ill. Comp. Stat. Ann. 150/6. Under that non-judicial procedure, the seizing agency has 52 days from the date of seizure to notify the State's Attorney

of the seizure "and the facts and circumstances giving rise to the seizure." *Id.* 150/5. Within 45 days after the State's Attorney is notified by the seizing agency that a property has been seized, she provides notice to "all known interest holders of the property." *Id.* 150/6(A). Interest holders then have 45 additional days to demand a judicial forfeiture proceeding, which they can trigger by filing a claim and cost bond with the State's Attorney.[2] If a claim is filed, the State's Attorney must either initiate a judicial forfeiture proceeding within 45 days or return the property. *Id.* 150/6(C), 150/9(A). If no claim is filed, the property is forfeited. *Id.* 150/6(D).

Absent "good cause," a civil judicial forfeiture proceeding is to be heard within 60 days after the claimant answers the complaint. 725 Ill. Comp. Stat. Ann. 150/9(F). The court may stay the civil forfeiture proceeding, however, if a "related" criminal prosecution is pending in a trial court. *Id.* 150/9(J).

2. Respondents brought this action under 42 U.S.C. § 1983 against petitioner's predecessor as

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[2] The cost bond is a cashier's check payable to the clerk of the court "in the sum of 10 percent of the reasonable value of the property as alleged by the State's Attorney or the sum of $100, whichever is greater, upon condition that, in case of forfeiture, the claimant must pay all costs and expenses of forfeiture proceedings." *Id.* 150/6(C)(2). "If none of the seized property is forfeited in the judicial in rem proceeding, the clerk of the court shall return to the claimant, unless the court orders otherwise, 90% of the sum which has been deposited and shall retain as costs 10% of the money deposited." *Id*. 150/6(C)(3).

State's Attorney for Cook County; the City of Chicago; and the Superintendent of the Chicago Police Department. Respondents have all had property seized without a warrant by Chicago police officers and seek to represent a class of similarly situated individuals. Their seized property included automobiles and cash. Respondents contended below that due process requires a prompt "probable cause" hearing "within ten business days of any seizure." They sought declaratory and injunctive relief. The district court rejected their claims and dismissed their case based on the authority of *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994). Pet. App. 12a.

3. The court of appeals, applying the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), concluded that "given the length of time that may result between the seizure of property and the opportunity for an owner to contest the seizure under the DAFPA, some sort of mechanism to test the validity of the retention of the property is required" by due process. *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008). The court remanded the case to the district court to "fashion appropriate relief consistent with this opinion." The court did provide some guidance for the district court in this regard. It instructed that

> the hearing should be prompt but need not be formal. We leave it to the district court to determine the notice requirement and what a claimant must do to activate the process. We do not envision lengthy evidentiary

> battles which would duplicate the final forfeiture hearing. The point is to protect the rights of both an innocent owner and anyone else who has been deprived of property and, in the case of an automobile or personal property other than cash, to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending.

524 F.3d at 838-39.

SUMMARY OF ARGUMENT

1. DAFPA, like many state forfeiture statutes, provides powerful, dangerous, and unconstitutional financial incentives for law enforcement agencies and prosecutors offices to overreach. When the police department and the district attorney's office derive a significant part of their funds from forfeitures, the invitation to overreach is overwhelming. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (unconstitutional prosecutorial bias exists if there is "a realistic possibility that the [prosecutor's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts."). Where law enforcement agencies have such a direct and powerful pecuniary incentive to seize more than the law permits, it makes sense to impose more procedural safeguards to prevent abuse and protect private property rights.

Moreover, DAFPA is stacked in favor of the State's law enforcement agencies and is bereft of

substantive and procedural protections for the innocent property owner. The Illinois statute contrasts with the federal Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which carefully balances the needs of law enforcement with layers of protections for property rights. The Court should consider the due process question presented in light of this background. The Court should hold that the widely used three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) is the appropriate test to apply in determining whether an opportunity for some sort of prompt post-seizure hearing is necessary under the DAFPA to satisfy due process.

At the time it was handed down by this Court in 1983, the decision in *$8,850* was an important advance in providing some protection against unjustifiable pre-filing delay by the government. However, the fact-specific test borrowed by the Court from *Barker v. Wingo,* 407 U.S. 514 (1972), proved to be nearly impossible for a claimant to satisfy, at least as the four-factor test was applied by the lower courts.

Indeed, the best evidence that *$8,850's* laborious fact-specific test was not an effective cure for the problem of pre-filing delay is the enactment of the CAFRA. Despite *$8,850*, pre-filing delay remained a chronic problem in federal civil forfeiture cases. One of the most important reforms in the CAFRA was the fixing of firm time limits for the government to notify the property owner of the seizure and his right to contest the forfeiture, 18 U.S.C. § 983(a)(1), and, if an

administrative claim is filed, for filing a complaint in the federal district court.

In any event, petitioner and the United States err in arguing that this case is about pre-filing delay. That is a separate issue addressed by *$8,850*. The court of appeals, relying heavily on Judge Sotomayor's opinion for the court in *Krimstock v. Kelly,* 306 F.3d 40 (2d Cir. 2002), correctly distinguished *$8,850* as dealing with "the speed with which the civil forfeiture proceeding itself is begun – a different question from whether there should be some mechanism to promptly test the validity of the seizure." 524 F.3d at 837.

Furthermore, the hearing contemplated by the court of appeals, like the hearing fashioned in the *Krimstock* litigation, also provides an owner with an opportunity to argue for the interim release of his property on hardship grounds or to offer a bond for its release – important protections that don't go to the merits or to the question of probable cause to seize. *Krimstock*, 306 F.3d at 68. For all these reasons, *Mathews* is the appropriate test.

2. The *Krimstock* hearing has proven to be an effective and not overly burdensome solution to the problem of undue government delay in providing notice and a meaningful, timely opportunity to contest the seizure and/or seek the release of the property *pendente lite*. Faced with a *Krimstock* hearing, the New York Police Department has been forced to quickly consider whether it really wishes to

forfeit, or retain pending further proceedings, the automobile it has seized. This has led to early, sensible settlement of a great many cases in the days and weeks leading up to a scheduled *Krimstock* hearing. If there is no possibility of an early hearing, the police will naturally not be inclined to investigate the facts or speak with the car owner until after the judicial forfeiture process commences.

This encouragement of early settlements is probably the best result of the *Krimstock* process. These early settlements have served the interest of New York City as well as the vehicle owners. They avoid the economic loss resulting from prolonged detention of seized vehicles, wasting assets with high storage costs relative to their value. They avoid the cost of unnecessary litigation. They encourage the police to quickly separate the cases involving real criminals and dangerous drivers, who present "a heightened risk to public safety" from those involving first time drunk driving offenders who were not seriously over the legal blood alcohol content limit. And experience has shown that they accomplish all this without placing an undue burden on the NYPD.

3. Because federal civil forfeitures typically are far more complex factually and legally than forfeitures under DAFPA and involve property of far greater value, police and prosecutors in Illinois need much less time to investigate a case and file a civil forfeiture suit than their federal counterparts. The DAFPA provision at issue in this case is limited to vehicles (of any value) and to other personal property

worth less than $20,000. By contrast, the value of the property involved in a federal civil forfeiture case can run into the hundreds of millions of dollars. Thus, petitioner's (Br. 65-66) and the United States' (Br. 20) comparison of the time limits found in the federal CAFRA with those in the Illinois state DAFPA is an exercise in comparing apples and oranges. Although the government has "an interest in a rule that allows [it] some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture," *$8,850*, 461 U.S. at 565-66, Illinois police and prosecutors do not need nearly as much time as the DAFPA allows them to make this determination because of the simplicity of the factual and legal questions presented by DAFPA cases.

A more significant comparison of the time limits under DAFPA with those in other similar state forfeiture statutes shows that the DAFPA time limits are unreasonably long, contrary to the position of petitioner and the United States. The Court should review the survey of other states' forfeiture laws attached as Table A to the Brief of the States of Illinois, Alabama, Arizona, et al. as Amici Curiae In Support of Petitioner. It demonstrates that the DAFPA's time limits are among the most generous to the state of any forfeiture statute in the country. Moreover, the DAFPA falls short in many other respects as it contains almost no procedural protections or other safeguards for the property owner.

ARGUMENT

I. THIS COURT'S REMEDY IN *$8,850* HAS NOT PREVENTED UNDUE GOVERNMENT DELAY IN FILING CIVIL FORFEITURE PROCEEDINGS AND, IN ANY EVENT, ADDRESSES A DIFFERENT QUESTION FROM WHETHER THERE SHOULD BE A MECHANISM TO PROMPTLY TEST THE VALIDITY OF SEIZURE AND OBTAIN INTERIM RELEASE OF PROPERTY.

DAFPA, like many state forfeiture statutes, provides powerful, dangerous, and unconstitutional financial incentives for law enforcement agencies and prosecutors offices to overreach. When the police department and the district attorney's office derive a significant part of their funds from forfeitures, the invitation to overreach is overwhelming. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (unconstitutional prosecutorial bias exists if there is "a realistic possibility that the [prosecutor's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts."). Where law enforcement agencies have such a direct and powerful pecuniary incentive to seize more than the law permits, it makes sense to impose more procedural safeguards to prevent abuse and protect private property rights. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56, 114 S. Ct. 492, 502 (1993) (relying on fact that law enforcement now has "a direct pecuniary interest in the outcome of the proceeding"; quoting shocking

1990 memo in which the Attorney General urged U.S. Attorneys to increase the volume of forfeitures to meet the Department of Justice's annual budget target).

Moreover, DAFPA is stacked in favor of the State's law enforcement agencies and is bereft of substantive and procedural protections for the innocent property owner, as we explain below. The Illinois statute contrasts with the federal Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which carefully balances the needs of law enforcement with layers of protections for property rights. The Court should consider the due process question presented in light of this background. The Court should hold that the widely used three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) is the appropriate test to apply in determining whether an opportunity for some sort of prompt post-seizure hearing is necessary under the DAFPA to satisfy due process.

At the time it was handed down by this Court in 1983, the decision in *$8,850* was an important advance in providing some protection against unjustifiable pre-filing delay by the government. However, the fact-specific test borrowed by the Court from *Barker v. Wingo,* 407 U.S. 514 (1972), proved to be nearly impossible for a claimant to satisfy, at least as the four-factor test was applied by the lower courts. The proof is in the pudding. There are few reported decisions in which a claimant prevailed on a due process delay claim under *$8,850*. The lower

courts were reluctant to find that the four-part test was satisfied because the remedy of dismissal with prejudice was viewed as too drastic a sanction for the government's lassitude or neglect. Moreover, courts did not wish to find fault with "their" local AUSA's handling of the case.

Indeed, the best evidence that *$8,850's* laborious fact-specific test was not an effective cure for the problem of pre-filing delay is the enactment of the CAFRA. Despite *$8,850*, pre-filing delay remained a chronic problem in federal civil forfeiture cases. One of the most important reforms in the CAFRA was the fixing of firm time limits for the government to notify the property owner of the seizure and his right to contest the forfeiture, 18 U.S.C. § 983(a)(1), and, if an administrative claim is filed, for filing a complaint in the federal district court. If the government fails to file the complaint within the time fixed by the statute, or obtain an extension of the filing deadline "for good cause shown" or obtain a criminal indictment containing an allegation that the property is subject to forfeiture, it must return the property and "may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B). Following the enactment of the CAFRA, the pre-filing delay remedy provided by *$8,850* became largely superfluous in federal civil forfeiture cases. Because nearly all of the more important state forfeiture statutes contain fixed time limits for filing the forfeiture case, *$8,850* has played an insignificant role in protecting

property owners from undue filing delay in state forfeiture proceedings.

In any event, petitioner and the United States err in arguing that this case is about pre-filing delay. That is a separate issue addressed by *$8,850*. The court of appeals, relying heavily on Judge Sotomayor's opinion for the court in *Krimstock v. Kelly,* 306 F.3d 40 (2d Cir. 2002), correctly distinguished *$8,850* as dealing with "the speed with which the civil forfeiture proceeding itself is begun – a different question from whether there should be some mechanism to promptly test the validity of the seizure." 524 F.3d at 837. This case is about whether respondents are entitled to a prompt post-seizure hearing as to the existence of probable cause at or about the time of seizure.[3] That issue is not the same as the one presented at the forfeiture hearing. Then, the issue is whether the state has sufficient evidence *at the time of the forfeiture hearing* to show that the property is subject to forfeiture. *See Krimstock v. Kelly*, 306 F.3d at 49-50; 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases,* ¶10.05A, 10-89 (Dec. 2008 ed.).

Furthermore, the hearing contemplated by the court of appeals, like the hearing fashioned in the

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[3] It is significant that all of the property seized in this case was seized from respondents without a warrant and that there was no *ex parte* review of the seizure by a court after the seizure. *Compare* Alaska Stat. § 17.30.114, 17.30.116 (requiring *ex parte* probable cause determination within 48 hours of seizure for civil forfeiture).

Krimstock litigation, also provides an owner with an opportunity to argue for the interim release of his property on hardship grounds or to offer a bond for its release – important protections that don't go to the merits or to the question of probable cause to seize. *Krimstock*, 306 F.3d at 68. For all these reasons, *Mathews* is the appropriate test. And, for the reasons stated in respondents' brief and by their other amici, the court of appeals properly applied the *Mathews* test in this case, reaching the same result as the Second Circuit in *Krimstock*.[4]

II. THE *KRIMSTOCK* HEARING HAS PROVEN TO BE AN EFFECTIVE AND NOT OVERLY BURDENSOME MEANS OF PREVENTING GOVERNMENT DELAY IN PROVIDING NOTICE AND A MEANINGFUL, TIMELY OPPORTUNITY TO CONTEST SEIZURE AND/OR SEEK RELEASE OF PROPERTY *PENDENTE LITE*.

Petitioner and her amici contend that the preliminary hearing contemplated by the court of

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[4] Even if characterized as a mandatory injunction, the relief granted by the Seventh Circuit was justified because "the facts and the law clearly favored" respondents. *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976). Further litigation over additional responsive pleadings or discovery would have been futile to overcome the court of appeals' ruling that *Mathews* controls this case. *Cf. Film TecCorp v. Hyranautics*, 67 F.3d 931, 939 (Fed. Cir. 1995) (affirming refusal to allow filing of additional responsive pleading because doing so would be futile).

appeals would unduly burden law enforcement. However, they do not provide this Court with any reason to believe that such hearings are particularly burdensome. One wonders why they do not discuss the actual workings of the *Krimstock* hearing in New York City since that would presumably provide the best evidence that such hearings are burdensome to law enforcement. As it happens, there is an excellent study of the actual way that *Krimstock* hearings work in practice, written by two attorneys who participated in a Latham & Watkins *pro bono* program that provides legal representation for indigent claimants in *Krimstock* cases. Since the program's inception, Latham lawyers have represented more than a hundred *Krimstock* clients, thus providing a substantial basis for evaluating the *Krimstock* hearing in practice. Gregory L. Acquaviva & Kevin M. McDonough, *How to Win a Krimstock Hearing: Litigating Vehicle Retention Proceedings Before New York's Office of Administrative Trials and Hearings*, 18 Widener L.J. 23 (2008).

Faced with a *Krimstock* hearing, the New York Police Department has been forced to quickly consider whether it really wishes to forfeit, or retain pending further proceedings, the automobile it has seized. This has led to early, sensible settlement of a great many cases in the days and weeks leading up to a scheduled *Krimstock* hearing. If there is no possibility of an early hearing, the police will naturally not be inclined to investigate the facts or speak with the car owner until after the judicial

forfeiture process commences. *See* 18 Widener L.J. 23, 85 & n.377-80. On the day of the *Krimstock* hearing, a judge conducts a settlement conference with the parties if they have not already settled the case. *Id*., at 81. This encouragement of early settlements is probably the best result of the *Krimstock* process. These early settlements have served the interest of the City as well as the vehicle owners. They avoid the economic loss resulting from prolonged detention of seized vehicles, wasting assets with high storage costs relative to their value. They encourage the police to quickly separate the cases involving real criminals and dangerous drivers, who present "a heightened risk to public safety," *id*. at 63, from those involving first time drunk driving offenders who were not seriously over the limit. If an early settlement is not reached, the same types of considerations inform the decision of the City's Office of Administrative Trials and Hearings ("OATH") court on whether to release the vehicle to its owner *pendente lite*. *Id*., at 53-80.

The *Krimstock* hearing is not limited to the question of whether the police had probable cause for the seizure. Rather, it requires the police department to prove that it is likely to prevail at the forfeiture hearing by a preponderance of the evidence *and* that returning the vehicle to the claimant prior to the forfeiture hearing presents a heightened risk to

public safety.[5] The "public safety" factor involves consideration of the owner's alleged offense, prior record and background. The *Krimstock* process also allows the claimant to present an affirmative "innocent owner" defense and to show why continued impoundment would substantially interfere with his "'ability to obtain critical life necessities such as earning a livelihood, obtaining an education, or receiving necessary medical care.'" *Id*., at 79-80, quoting *Property Clerk v. Harris*, 878 N.E. 2d 1004, 1012 (N.Y. 2007). For these reasons, the hearing is more complicated than the one that the Seventh Circuit seems to contemplate in its decision. Despite that additional complexity, the *Krimstock* hearing does not appear to be overly burdensome for the police department. The time it takes is more than outweighed by the benefits it confers on both the owner and the police department.

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[5] This requirement was not imposed by Chief Judge Mukasey's decision, but rather by an OATH court. *Id*., at 62-63. Under Judge Mukasey's decision, the police department only had to prove that retention of the vehicle is necessary to ensure its availability in forfeiture proceedings. *Krimstock v. Kelly*, 2005 U.S. Dist. LEXIS 43845, at *4 (S.D. N.Y. Nov. 29, 2005). Interestingly, New York's highest court has noted the City's ability to preserve the value of seized assets through less restrictive means than continued retention. *Property Clerk v. Harris*, 878 N.E.2d 1004, 1011 (N.Y. 2007) (City may protect its interest in forfeitable property by securing a bond or seeking a restraining order prohibiting sale of property); *County of Nassau v. Canavan*, 802 N.E.2d 616, 625 (N.Y. 2003) (same as to Nassau County). The CAFRA authorizes courts to issue restraining orders for the same purpose. 18 U.S.C. § 983(j).

"The *Krimstock* hearing is an expedited proceeding featuring brief opening statements, witness examination, and closing arguments." *Id.*, at 81-82. After opening statements, the police department presents its case-in-chief.

> More often than not, the Police Department will open its case by offering into evidence several exhibits, including the arrest report and criminal complaint report. Due to the liberal evidence rules that govern OATH proceedings – the OATH rules do not require compliance with 'technical rules of evidence, including hearsay rules,' – the Police Department's exhibits are generally admitted into evidence without issue. Indeed, counsel seldom objects during the introduction of evidence and the examination of witnesses . . . Once the exhibits have been admitted, the Police Department typically takes testimony from the claimant, if the claimant is available. The claimant is often the only witness who will testify during the hearing.

Id. "After all of the evidence has been presented and the record is closed, the judge renders a written decision, usually within three business days of the hearing." *Id*., at 84.

One of the many bogeyman arguments raised by the Solicitor General is that if the court of appeals' remedy turns out to require a probable cause hearing after every seizure, it would "burden the judicial system with hearings even in uncontested cases." Br. 25. This concern is groundless because there is no

reason to require such a hearing if the owner does not wish to contest the forfeiture of his property. A *Krimstock* hearing is only provided when a person with standing to contest the forfeiture requests such a hearing and only one person may appear as the claimant at the hearing. Preference is given to the registered owner. *Id.*, at 72.

The Solicitor General also argues (Br. 25) that a preliminary hearing that involves claimant's assertion of an innocent owner defense would create tension with the claimant's right against compelled self-incrimination in any related criminal case. While the government's concern about the claimant's Fifth Amendment right is touching, it overlooks the fact that a claimant, not the state, is in the best position to decide whether it is in his interest to testify at the preliminary hearing or not. A putative innocent owner is not normally in any danger of being charged criminally. This is not really a Fifth Amendment privilege question at all.

The Solicitor General's concern (Br. 24) about pretrial exposure of its own related criminal case or investigation at an early hearing is also a make-weight. The trial judge can deal with this problem, if it arises, through a stay of the civil forfeiture proceeding or by allowing the state to make *ex parte* submissions under seal. Moreover, the police should have no problem demonstrating probable cause for the seizure since the Fourth Amendment requires them to have such evidence prior to seizing the property.

III. PETITIONER'S COMPARISON OF THE TIME LIMITS IN THE FEDERAL CAFRA TO THOSE IN ILLINOIS' DAFPA IS A MISLEADING EXERCISE THAT COMPARES APPLES AND ORANGES.

1. Because federal civil forfeitures typically are far more complex factually and legally than forfeitures under DAFPA and involve property of far greater value than under DAFPA, police and prosecutors in Illinois need much less time to investigate a case and file a civil forfeiture suit. The DAFPA provision at issue in this case is explicitly limited to vehicles and to other personal property worth less than $20,000. By contrast, the value of the property involved in a federal civil forfeiture case can run into the hundreds of millions of dollars. *E.g., United States v. All Assets Held at Bank Julius Baer & Co.*, 571 F. Supp. 2d 1 (D.D.C. 2008) (also illustrating how complex the factual and legal issues may be in federal cases). Thus, petitioner's (Br. 65-66) and the United States' (Br. 20) comparison of the time limits found in the federal CAFRA with those in the Illinois state DAFPA is an exercise in comparing apples and oranges. Although the government has "an interest in a rule that allows [it] some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture," *$8,850*, 461 U.S. at 565-66, Illinois police and prosecutors do not need nearly as much time as the DAFPA allows them to make this determination because of the simplicity

of the factual and legal questions presented by DAFPA cases.

2. A more significant comparison of the time limits under DAFPA with those in other similar state forfeiture statutes shows that the DAFPA time limits are unreasonably lengthy, contrary to the position of petitioner and the United States. The Court should review the survey of other states' forfeiture laws attached as Table A to the Brief of the States of Illinois, Alabama, Arizona, et al. as Amici Curiae In Support of Petitioner. It demonstrates that the DAFPA's time limits are among the most generous to the state of any forfeiture statute in the country. As explained below, the DAFPA falls short in many other respects as it contains almost no procedural protections or other safeguards for the property owner.[6]

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[6] One of the most obnoxious provisions in the DAFPA is the requirement that a property owner post a cost bond (a cashier's check to compensate the State's Attorney for her litigation costs in a contested case) simply to obtain the right to contest the forfeiture of his property. Even if the owner completely prevails, DAFPA dictates that the clerk of the court retain ten percent of the bond! If the state prevails with respect to *any part* of the seized property, the claimant loses the entire cost bond. 725 ILCS 150/6(C)(3). The requirement of a cost bond obviously deters owners from seeking the return of their property. A prevailing claimant is not entitled to attorney's fees, costs or interest on any seized money. By contrast, the CAFRA provides that in any civil forfeiture proceeding in which the claimant "substantially prevails, the United States shall be liable for – (A) reasonable attorney fees and other litigation costs reasonably

(Continued on following page)

For example, in Florida, the government must provide notice within five business days of seizure and a preliminary hearing must be held within ten days after a request for such a hearing is received. The notice must state that a person entitled to receive notice may request an adversarial preliminary hearing. Fla. Stat. Ann. § 932.703(2)(a). Moreover, unlike the DAFPA, the Florida statute is not limited to personal property with a value of less than $20,000. It reaches every manner of property, real and personal, regardless of its value. Unlike the DAFPA, the Florida Contraband Forfeiture Act is not limited to drug offenses; rather, it reaches all felonies. If Florida can provide such speedy notice and an opportunity for a preliminary adversarial hearing in all felony cases without unduly burdening law enforcement, why does Illinois need so much more time to provide notice and an opportunity to be heard in much simpler cases? The Florida statute also provides far more procedural protections than the DAFPA and the state must prove its case by clear and

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incurred by the claimant; (B) post-judgment interest, as set forth in section 1961 of this title; and (C) . . . (i) interest actually paid to the United States from the date of seizure . . . and (ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid . . . " 28 U.S.C. § 2465(b)(1). Another provision of the CAFRA amended the Federal Tort Claims Act, 28 U.S.C. § 2680(c), to make the United States liable for damages caused to the property while in government custody if the claimant prevails. There is no such liability for damages under the DAFPA.

convincing evidence, a much higher burden than mere "probable cause," which may be shown through rank hearsay evidence. Fla. Stat. Ann. § 932.704(8). *See generally,* 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases,* Ch. 17 (Dec. 2008 ed.) (discussing Florida Contraband Forfeiture Act).

Arizona, a state with a history of aggressively pursuing forfeiture of assets, sometimes of high value, has a statute that allows a court to hold a hearing on probable cause within only *five* business days of the seizure, if there has been no prior judicial determination of probable cause. Ariz. Rev. Stat. § 13-4310. In the case at bar there were no prior judicial determinations of probable cause with respect to any of the respondents' property.[7]

In Missouri, the government has a mere fourteen days after seizure within which to file a forfeiture case in court and the claimant can file a motion to dismiss that must be ruled on within ten days. Mo. Rev. Stat. §§ 513.607.6(2), 513.612. Even Texas, a state known for its "tough on crime" policies, requires the prosecutor to institute forfeiture proceedings in

[7] Thus, the Seventh Circuit, like the *Krimstock* court, was fully justified in relying on the Florida and Arizona statutes to illustrate that "some states have procedures which provide an early opportunity to challenge the retention of seized property." *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008). Moreover, these other state statutes also demonstrate that it is not unduly burdensome to hold an adversarial preliminary hearing within a short time of the seizure.

court within thirty days of seizure. Tex. Code Crim. Proc. Art. 59.04(a). This requirement has not deterred some of the most aggressive local forfeiture agencies in the country.[8]

Significantly, Illinois itself requires preliminary hearings in a wide variety of related forfeiture schemes, even though under those statutes the value of the property may be much greater and the cases more complex than under the DAFPA. *See* Amicus Brief of the Women's Criminal Defense Bar Association in Support of Respondents.

3. Petitioner's and the United States' comparison of the DAFPA with the CAFRA is also misleading because the property owner and persons with an interest in the property have various avenues to obtain an early adversarial hearing or hardship or bond release under the CAFRA and other federal law, notably Rule 41(g), whereas the DAFPA affords no similar opportunities for obtaining an early hearing or other mechanism by which the release of the property *pendente lite* may be had.

This Court's decision in *$8,850* explains that a property owner in a federal civil forfeiture case has "multiple ways of compelling the forfeiture process to

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[8] *See "Property Seizures Seen As Piracy,"* San Antonio Express-News, Feb. 7, 2009; "*Texas town stops black motorists, seizes assets*," Chicago Tribune, Mar. 13, 2009 (reporting on horrific forfeiture scandal in Tenaja, Texas reminiscent of similar local forfeiture scandals in the 1990's).

move forward," in the words of the Solicitor General (Br. 16). These include "filing an equitable action seeking an order compelling commencement of a civil judicial action or return of the property; . . . and filing a motion under then-Rule 41(e) of the Federal Rules of Criminal Procedure – now Rule 41(g) – challenging the validity of the seizure and seeking return of the property."[9] *Ibid.*

Petitioner claims (Br. 46) that Illinois law allows property owners to petition a court for the return of personal property they contend the government wrongfully seized. This remedy would supposedly avoid the up to 187 day pre-filing delay that the Seventh Circuit found intolerable. Respondents contend that such a remedy is not available under Illinois law. The record does not demonstrate who is right. However, it should be noted that *Krimstock*

[9] Rule 41(g) is not simply a device for pressing the government to file a forfeiture complaint. It allows an owner faced with irreparable injury from the government's continued retention of property seized without probable cause to obtain an extremely prompt hearing on the merits of the government's case. It is widely used in cases where entire businesses or perishable goods such as fish are seized for forfeiture. *United States v. Sims*, 376 F.3d 705, 708 (7th Cir. 2004); *Mr. Lucky Messenger Service v. United States,* 587 F.2d 15, 18 (8th Cir. 1978). A claimant can obtain the same relief by moving for a preliminary injunction against the government under Rule 65. *E.g., Delaware Valley Fish Co. v. Fish and Wildlife Service,* 2009 U.S. Dist. LEXIS 51089, *10-12 (D. Me. June 12, 2009) (recommending that court grant preliminary injunction ordering FWS to release plaintiff's truck used to transport live baby eels).

ruled that an owner's ability to bring suit to force the City to justify its retention of the property is not an adequate substitute for a right to an early probable cause hearing because it places the onus on each claimant to file and pursue a separate civil action and each claimant would bear the burden of showing a clear legal right under state law to release of their vehicles. 306 F.3d at 59-60.[10] Thus, even if such a remedy is available under Illinois law, it is inadequate. The Rule 41(g) remedy under federal law, by contrast, does not require the owner to file a separate lawsuit against the government with all the expense and built in delay that entails. A simple motion is enough to obtain the desired result.[11]

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[10] In low value cases such as those brought under the DAFPA, a high percentage of claimants appear *pro se* because counsel is prohibitively expensive. The type of informal post-seizure hearing contemplated by the court of appeals would greatly benefit *pro se* claimants. Even assuming that Illinois law permits the filing of a suit for the return of property, the typical *pro se* owner is not capable of making use of such a remedy. For that matter, a *pro se* claimant is not capable of arguing a motion under *$8,850* either. Indeed, given the low value of the property, the sort of lawyer an owner is likely to be able to retain may not have the time and ability to brief an *$8,850* issue.

[11] Another important difference between Illinois and federal law is that in federal civil forfeiture cases the property is almost always seized pursuant to a warrant obtained by demonstrating probable cause to a district court judge or magistrate judge. In this case, by contrast, all of the property was seized without warrants. It makes sense to require an early probable cause hearing where the police have seized property without a warrant.

Another major difference between the CAFRA and the DAFPA involves the availability of procedures to obtain the release of the property based on substantial hardship or in exchange for a 100% bond. As the Seventh Circuit observed, 524 F.3d at 838, it is difficult to understand what interest the state has in retaining possession of the typical seized car when the property owner is willing to post the cash value of the car, as appraised by the State's Attorney, in exchange for the release of the vehicle *pendente lite* or as a substitute *res*.[12] The posting of the 100% bond relieves the state of the cost and burden of storing the vehicle and avoids the economic loss inherent in prolonging its seizure for months or years. 19 U.S.C. § 1614 is the customs law provision authorizing the release of seized property by the government when the owner "offers to pay" the appraised value of the property. The court would not become involved in this procedure unless the government unreasonably refuses to release the property upon payment of its full value.[13] Section 1614 is now complimented by Rule G(7)(b)(v), which

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[12] If the vehicle is specially fitted out for drug smuggling or the like, that would, of course, justify the state's continued retention of the vehicle. But such instances are uncommon. *See United States v. One Solid Gold Object In Form of a Rooster*, 186 F. Supp. 526, 527 (D. Nev. 1960) ("For the Government to refuse a bond in the amount of the actual value of an automobile would be without basis in reason or logic.").

[13] The absence of federal case law on this point shows that the seizing agencies rarely deny release of seized property when the owner offers to post the full appraised value of the property.

provides that the court "may order that the property be delivered to the claimant pending the conclusion of the action if the claimant shows circumstances that would permit [interlocutory] sale under Rule G(7)(b)(i) and gives security under these rules."

Because many owners are not financially able to deposit the full value of a seized vehicle, the hardship release provision of the CAFRA fills an important role in mitigating the harshness of civil forfeiture. Under 18 U.S.C. § 983(f)(1) a claimant "is entitled to the immediate release of seized property" if the statutory requirements for hardship release are met. The hardship must be "substantial" and "outweigh[ ] the risk that the property will be destroyed, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceedings." § 983(f)(1)(D). A hardship petition may be filed at any time; a property owner need not wait for the judicial action to commence. § 983(f)(3). Vehicles necessary for making a living have been released under the hardship provision. *E.g., United States v. $1,231,349.68 in Funds*, 227 F. Supp. 2d 125 (D.D.C. 2002).

The availability of a procedure for obtaining interim relief on grounds of hardship, or release on bond, are other considerations under the *Mathews* balancing test going to the importance of the affected private interest. *Krimstock*, 306 F.3d at 61-62. Accordingly, the differences between the CAFRA and the DAFPA – which has no hardship relief or bond release provision – should not be minimized.

DAFPA's unduly long period of time for notice and an opportunity to be heard is of a piece with the rest of the statute's provisions, which are singularly lacking in safeguards for the property owner's rights.[14] CAFRA, by contrast, is loaded with important procedural and substantive protections for the property owner. We have already noted that the CAFRA awards attorney fees, costs and interest to claimants who "substantially prevail" against the government, and allows suits for damage to seized property against the sovereign as well. The DAFPA provides none of these remedies and even mulcts a *prevailing* claimant for 10 percent of the required cost bond. Another significant difference is that the CAFRA provides authority for the court to appoint counsel for indigent claimants under certain circumstances. 18 U.S.C. § 983(b). DAFPA does not. Far from helping the owner to obtain representation, it makes the owner's lot more difficult by needlessly requiring the posting of a cost bond.

One of the most important differences between the two statutes is the government's burden of proof.

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[14] "It is the aggregate effect of forfeiture proceedings – summary seizures, minimalist government justification, shifting of burdens, unreasonable time limits for contesting forfeitures, generous time limits for prosecuting them, readily invoked default rules, and bond posting requirements – which combine to make the process unfair." Professor Mary M. Cheh, *Can Something This Easy, Quick and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. Sch. L. Rev. 1, 45-46 (1994).

Under the CAFRA, the government's burden of proof is the normal civil standard of preponderance of the evidence. 18 U.S.C. § 983(c)(1). (Several state civil forfeiture schemes require the state to prove its case by clear and convincing evidence or even beyond a reasonable doubt.)[15] The DAFPA only requires the state to show that there is probable cause to believe that the property is subject to forfeiture. 725 ILCS 150/9(G). This merely requires the state to show, through otherwise inadmissible hearsay evidence, "reasonable grounds for the belief that there exists a nexus between the property and illegal drug activity, supported by less than *prima facie* proof but more than mere suspicion." *People v. 1945 N. 31st St.,* 841 N.E.2d 928, 942 (Ill. 2005). It "requires only a probability or substantial chance of the nexus and not an actual showing." *Ibid*. Although the state is allowed to satisfy this ridiculously low burden with rank hearsay, the claimant's affirmative "innocent owner" defense must be proven by a preponderance of the evidence and the rules of evidence apply to *his* showing. 725 ILCS 150/9(B), (G).

Prior to the enactment of the CAFRA, the federal government's burden of proof was also merely to show

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[15] Chairman Henry J. Hyde's civil forfeiture reform bill, H.R. 1658, which became the CAFRA after numerous changes in the Senate, was approved by the House on June 24, 1999, on a vote of 375 to 48. Hyde's bill would have raised the government's burden of proof to *clear and convincing* evidence and was vehemently opposed by the DoJ and its law enforcement allies.

probable cause through otherwise inadmissible hearsay evidence.[16] 19 U.S.C. § 1615. This was the most criticized feature of pre-CAFRA federal civil forfeiture law and several federal courts had opined that the probable cause burden violated due process.[17] Congressmen and senators who lead the forfeiture reform effort were incredulous that the probable cause burden could be constitutional.

4. Finally, we would reiterate what we stressed at the beginning of this brief: that DAFPA, provides

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[16] Significantly, even before the enactment of the CAFRA, the vast majority of state civil forfeiture schemes required the state to prove its case by at least a preponderance of the evidence. Thus, the DAFPA was an outlier statute even before 2000.

[17] *E.g., United States v. Real Property in Section 9, Town 29 N.*, 241 F.3d 796, 799 (6th Cir. 2001) (characterizing probable cause burden of proof under pre-CAFRA law as "an aberration" that was repeatedly criticized by courts and commentators); *United States v. $49,576.00 U.S. Currency*, 116 F.3d 425, 428-29 (9th Cir. 1997) (Kozinski, J.) ("We would find it surprising were the Constitution to permit such an important decision to turn on a meager burden of proof like probable cause."); *United States v. Leasehold Interest in 121 Nostrand Ave.,* 760 F. Supp. 1015, 1032 (E.D. N.Y. 1991) (Weinstein, J.) ("shifting of the burden of proof stacks the deck heavily in favor of the Government" and is questionable both on policy and constitutional grounds); *United States v. $12,390.00*, 956 F.2d 801, 807-11 (8th Cir. 1992) (Beam, J., dissenting in part) (Judge Beam could not "reconcile the ease with which title to property may be forfeited under [19 U.S.C. § 1615] with the due process guarantee of the Fifth Amendment." "This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.").

powerful, dangerous, and unconstitutional financial incentives for law enforcement agencies and prosecutors offices to overreach. When the police department and the district attorney's office derive a significant part of their funds from forfeitures, the invitation to overreach is overwhelming. Such financial incentives may also seriously distort law enforcement priorities, making police more interested in seizing property than in arresting criminals. *See, e.g., United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56, 114 S. Ct. 492, 502 (1993) (emphasizing that government now "has a direct pecuniary interest" in forfeiture); *Harmelin v. Michigan*, 501 U.S. 957, 978-79 n.9 (1991) (Scalia, J., concurring) (because they increase government revenues instead of expenditures, economic sanctions are particularly subject to abuse and need to be carefully scrutinized); *United States v. Funds Held in the Name or For the Benefit of Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) ("This arrangement creates incentives that evidently require a more-than-human judgment and restraint . . . The bare financial facts of this case shine a light on the corrupting incentives of this [earmarking] arrangement: we see aggressive but marginal claims asserted on dubious jurisdiction to seize charitable funds raised for the relief of abject orphans in an impoverished country, so that the money can be diverted for expenditure by the Department of Justice."); *Krimstock*, 306 F.3d at 63 (emphasizing need for greater procedural safeguards where government has pecuniary interest in outcome of forfeiture proceedings); *United States v. Currency, In the Amount of*

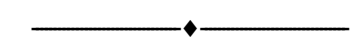
$150,660.00, 980 F.2d 1200, 1208 (8th Cir. 1992) (Bright, J., dissenting) (court should not find probable cause based on opinion of police officer that seized cash smelled of marijuana when his department would receive a direct financial benefit from the forfeiture).

Joseph McNamara has written about the perverse consequences of making the police dependent on forfeiture revenues. He observes that "police organizations have become addicted to grabbing property. . . . As police chief of San Jose during the 1980's, I was one of the worst addicts." "*When Police Take Property, Who Do You Call?*," Orange County Register, June 6, 1999, at 5.[18] When he complained to the city manager that there were no funds in the budget earmarked for police equipment, the city manager replied, "You guys seized $4 million last year, I expect you to do better this year." McNamara concluded that "when cops are put under pressure to produce good statistics and revenue, bad things happen." *Id.* This topic is explored at much

[18] While president of the National District Attorney's Association, Oklahoma County District Attorney Bob Macy blamed his office's budget shortfall on declining forfeiture revenues. Macy said the shortfall was due to local police agencies choosing to turn their forfeiture seizures over to the federal authorities so that they could get a larger share of the property than they would get in state court, where the loot had to be shared with the prosecutor's office (as in about half of the states). "*Macy Seeks Ways to Handle Budget*," The Daily Oklahoman, Jan. 1, 1993, at 19.

greater length in the Amicus Brief of the Institute for Justice in Support of Respondents. It is also examined at length in 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases,* ¶1.01, 1-9 to 1-12.2, 1-26.1 to 1-33; ¶7.02[2], 7-10.1 to 7-10.4 (Dec. 2008 ed.).

While the CAFRA did much to level the playing field in federal civil forfeiture cases, it did not address state forfeiture schemes, many of which remain fundamentally unfair and subject to great abuse by self-interested law enforcement agencies "policing for profit." This Court has not chosen to review the problems inherent in many of our state forfeiture statutes and the continual abuses to which they have given rise. The DAFPA statute before the Court in this case is a prime example of an unfair state forfeiture statute. It would be a pity if the Court reverses the judgment below and thus signals to the states that it will only take an interest in what is happening in this arena of the law when the decision below attempts to strike a blow for fairness and better protection of fundamental property rights.[19] Rather, the Court should use this opportunity to encourage the states to examine whether their forfeiture laws need reform to avoid challenges to their constitutionality.



[19] As the Court stated in *Good*, "[i]ndividual freedom finds tangible expression in property rights." 114 S. Ct. 492, 505.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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